In forma pauperis
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

NO. 854

DAVE CANTY,
Petitioner,

v.

THE STATE OF ALABAMA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM N. McQUEEN,
Acting Attorney General
Counsel for Respondent.

JOHN W. VARDAMAN
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I

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Alabama, which is here under consideration, is reported in 11 So. 2nd 844.

II.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of

this court to review the judgment of the Supreme Court of Alabama rendered on January 14, 1943, rehearing denied February 25, 1943. Petitioner relies upon Section 237 (b) of the United States Judicial Code, as amended on February 13, 1925, 43 Stat. 937, as giving this court jurisdiction.

Petitioner bases his claim for relief on the following proposition:

That he was denied due process of law because of illegal argument and conduct of the solicitor.

III.

STATEMENT OF THE CASE

Petitioner was indicted by the grand jury of Montgomery County at its May term 1938 for murder in the first degree. (R. 1) He was tried in the Circuit Court of Montgomery County, and his punishment was fixed by the jury at death. This judgment was affirmed by the Supreme Court of Alabama in *Canty v. State*, 238 Ala. 384, 191 So. 260, but was reversed by this Honorable Court, without opinion in 309 U. S. 629, 60 S. Ct. 612, 84 L. Ed. 988, citing *Chambers v. Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716; on the second trial in the Circuit Court of Montgomery County there was a verdict of guilty of murder in the first degree, and punishment was fixed at imprisonment for life. This judgment

was reversed by the Supreme Court of Alabama in 242 Ala. 589, 7 So. (2d) 319. The petitioner was then tried for the third time on June 16, 1942, in the Circuit Court of Montgomery County, Alabama, and there was a verdict of guilty of murder in the first degree and punishment was fixed at imprisonment for life. (R. 4) This judgment was affirmed by the Supreme Court of Alabama in *Canty v. State*, 11 So. (2d) 844. Petitioner now applies to this Honorable Court for a writ of certiorari.

STATEMENT OF FACTS

About 3:30 on Saturday afternoon, March 19, 1938, Miss Eunice Ward and Miss Lillian Ward drove out from the City of Montgomery in an automobile for the purpose of picking wild flowers. They travelled out what is known as the Vaughan Highway in Montgomery County, and turned off this highway at a point three hundred yards beyond the Masonic Home. After picking all the flowers they wanted, a light rain started and the Misses Ward got back into their automobile to come back to Montgomery. Before they could regain the highway, they were accosted by a negro clad in a black cap, blue shirt and dark trousers. (R. 11) When the negro demanded money of them, Miss Lillian gave him her pocketbook which, according to her testimony, contained a five dollar bill and sixty-five cents in change. He then ordered both of the ladies out of the automobile, commanding them to come to the left side of the car. When Miss Lillian Ward reached

this point, the assailant slashed her throat with a knife. Miss Eunice Ward then ran down the road toward the highway crying for help, and the assailant after her, overtaking her after she had run a short distance and brought her back to the automobile. When he brought Miss Eunice Ward back to the automobile, he commanded both of the ladies to go into the adjoining woods, where he attempted to rape both Miss Lillian Ward and Miss Eunice Ward, but was unsuccessful in both instances. (R. 12) During the attack, Miss Eunice Ward received a severe blow at the base of the skull with some blunt instrument from which blow she died a few days after the attack. Soon after this the assailant left the scene of the crime and Miss Lillian Ward climbed back into the automobile and attempted to start it, but being weak from the loss of blood and exposure, was unsuccessful in moving the car.

The assailant was seen after he fled from the scene of the crime by three young white boys, Devette Kelley, Julian Campbell, and Coleman O'Neill. (R. 23, 26, 28) According to these boys, who positively identified this petitioner, they first saw him running toward them, from the point where the ladies were alleged to have been attacked. They uniformly stated that when Canty reached a point about fifteen yards from them, he saw them, turned and ran in the opposite direction back into the woods. It appears that Canty continued running through the woods until he reached the route of one of the city buses, which he proceeded to board in great

haste. According to the bus driver, L. R. Lindsey, Canty boarded the bus breathing heavily and rode to the center of the business district of the City of Montgomery. (R. 32) This was at five o'clock on Saturday afternoon.

Meanwhile the Misses Ward lay unconscious in the woods through a driving rain which began about 4:30 and lasted well into the night. Early Sunday morning Miss Lillian Ward managed to crawl to the Vaughan road, some three hundred yards from the point of attack, where she stopped an automobile and asked the occupants to send aid. A short time thereafter the Misses Ward were picked up by two members of the Alabama State Highway Patrol and taken to St. Margaret's Hospital in Montgomery where they were treated for their injuries by Dr. John Blue, a practicing physician of the City of Montgomery.

Miss Eunice Ward died from a fracture at the base of her skull, produced by a blow from a blunt instrument, several days after her admission into the hospital. (R. 21)

One night shortly after the homicide the petitioner appeared at the home of a negro fortune teller named Hattie Howard. According to Hattie Howard the petitioner told her, "I am in a little trouble." (R. 38) Hattie Howard then asked him about the homicide that occurred and asked him if he was con-

nected with it at all. She testified that the petitioner, after hesitating a few minutes, said: "I will tell you the truth I did, I hit the big one first and didn't do anything to the other one but she tried to fight." (R. 39)

Canty stayed in the home of the fortune teller throughout the night and the next morning after promising to write her from Mobile, using the name of Rudie Ray, was shown the L. & N. R. R. tracks by Hattie Howard's husband, J. S. Howard. (R. 40)

The following Saturday, March 25th, Hattie Howard received a letter from Mobile, Alabama, signed Rudie Ray. Her husband turned the letter over to Mayor Gunter. Whereupon, City Policemen Rapport, Dennison, and Chancellor, together with J. S. Howard, who was carried along for the purpose of identifying Canty, left Montgomery in search of petitioner. (R. 42)

Petitioner was found asleep in a colored rooming house in Mobile, and when first accosted by the officers denied that his name was Canty, asserting it to be Rudie Ray. He was taken from the rooming house and brought downstairs where Howard identified him as the negro who had consulted his wife. (R. 42) Whereupon, Canty admitted his identity. Canty was then taken to the police station in Mobile and later the same night was returned by automobile to Montgomery where he was confined in Kilby

Prison. While Canty was confined at Kilby Prison, the three boys, who on the Sunday morning immediately following the attack had notified the police of having seen the petitioner, were brought out to the prison, confronted with Canty and positively identified him as the negro they had seen running from the scene of the crime. (R. 24, 27, 29) On a later occasion Canty was presented to Miss Lillian Ward and was again identified as being the negro who attacked her. (R. 14)

This in substance was the evidence presented by the State.

The petitioner denied any connection with the attack and supported his denial with numerous alibi witnesses.

Inasmuch as the proceedings in this court are in forma pauperias, and no printed record has been furnished respondent, all references herein are to the typewritten copy of the record which has been heretofore furnished this court.

IV.

PROPOSITIONS OF LAW

I.

Illegal argument of the solicitor to the jury does not deprive accused of due process of law.

Snyder v. Mass., 291 U.S. 97

Powell v. Ala., 287 U.S. 45

Blackner v. U. S., 284 U.S. 421

Brown v. N. J., 175 U.S. 172

Leeper v. Texas, 139 U.S. 462

II.

The argument and conduct of the solicitor before the jury is a matter of state procedure and practice that is controlled by state court decision.

Dohany v. Rogers, 281 U.S. 362

Holmes v. Conway, 241 U.S. 624

Twining v. N. J., 211 U.S. 78.

Walker v. Sauvinet, 92 U.S. 90

III.

Error of state court in deciding the law does not constitute deprivation of due process of law.

Corrigan v. Buckley, 271 U.S. 323

Goltra v. Weeks, 271 U.S. 536

Palmer v. Ohio, 248 U.S. 32

Holmes v. Conway, 241 U.S. 624

Howard v. Ky., 200 U.S. 164

Re Converse, 137 U.S. 624

Hubbard v. Hubbard, 77 Vt. 73, 58 A. 969

V.

ARGUMENT

Petitioner contends that he has been denied due process of law by the argument of the solicitor to the jury and his conduct during the trial. We respectfully submit that the conduct and argument of the solicitor in the case at bar was not prejudicial to petitioner, but even if such conduct and argument were prejudicial that, of itself, would not constitute a denial of due process of law as guaranteed petitioner by the Fourteenth Amendment to the Constitution of the United States.

On the trial of this case in the Circuit Court of Montgomery County petitioner objected to the certain parts of the solicitor's argument to the jury. The record (p. 66) discloses the following:

"The defendant objected to the statement of the solicitor in his argument to the jury 'that the defendant tried to ravish either one of the women,' and the court stated to the jury the indictment charges only murder, but he would have a right to discuss the testimony that has been offered—the other is just out.

"The defendant objected to the statement by the Solicitor as to Mayor Gunter having anything to do with the apprehension of this defendant.

"THE SOLICITOR: Well, he did not hear what I said, I said it was through our beloved Mayor Gunter that this defendant was apprehended.

"And defendant moved that the statement be excluded from the jury. The court overruled the motion and the defendant duly and legally reserved an exception.

"The defendant objected to the statement by the solicitor "That his (defendant's) life should be ended, he had had too much already," and to the statement by the solicitor "I will not withdraw that; I believe that from the evidence in the case." The court overruled the objection, and the defendant duly and legally reserved an exception."

Does such action on the part of the solicitor violate the due process clause of the Fourteenth Amendment? We think not. Although no precise definition of "due process of law" can be given, yet it has been generally considered to mean "law in the regular course of administration through courts of justice according to those rules and forms which have been established for the protection of private rights."

Brown v. N. J., 175 U.S. 172

Hallinger v. Davis, 146 U.S. 314

Leeper v. Texas, 139 U.S. 462

Caldwell v. Texas, 137 U.S. 692

Turpin v. Lemon, 187 U.S. 51

Scott v. McNeal, 154 U.S. 34

And the essential elements of due process of law, or that which cannot be taken away, are notice of the charge and an adequate opportunity to be heard in defense of it before a tribunal having jurisdiction of the cause.

Powell v. Ala., 287 U.S. 45

Snyder v. Mass., 291 U.S. 97

Blackmer v. U. S., 284 U.S. 421

In *Snyder v. Mass.*, supra, the court, speaking through Mr. Justice Cardozo, said:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Twining v. New Jersey*, 211

U.S. 78, 106, 111, 112, 53 L. ed. 97, 109, 111, 112, 29 S. Ct. 14; *Rogers v. Peck*, 199 U.S. 425, 434, 50 L. ed. 256, 260, 26 S. Ct. 87; *Maxwell v. Dow*, 176 U.S. 581, 604, 44 L. ed. 597, 606, 20 S. Ct. 448, 494; *Hurtado v. California*, 110 U.S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292; *Frank v. Mangum*, 237 U.S. 309, 326, 59 L. ed. 969, 979, 35 S. Ct. 582; *Powell v. Alabama*, 287 U.S. 45, 67, 77 L. ed. 158, 169, 53 S. Ct. 55, 84 A.L.R. 527. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Maxwell v. Dow*, 176 U.S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494, supra; *New York C. R. Co. v. White*, 243 U.S. 188, 208, 61 L. ed. 667, 677, 37 S. Ct. 247, L.R.A. 1917D, 1, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *Wagner Electric Mfg. Co. v. Lyndon*, 262 U. S. 226, 232, 67 L. ed. 961, 964, 43 S. Ct. 589. Indictments by a grand jury may give way to informations by a public officer. *Hurtado v. California*, 110 U.S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292, supra; *Gaines v. Washington*, 277 U. S. 81, 86, 72 L. ed. 793, 795, 48 S. Ct. 468. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. *Twining v. New Jersey*, 211 U.S. 78, 53 L. ed. 97, 29 S. Ct. 14, supra. What may

not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14 supra; *Powell v. Alabama*, supra, (287 U.S. 68, 71, 77 L. ed. 170, 171, 53 S. Ct. 55); *Holmes v. Conway*, 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681, Cf. *Blackmer v. United States*, 284 U. S. 421, 440, 76 L. ed. 375, 384, 52 S. Ct. 252."

We respectfully submit that the argument of a solicitor to a jury is not a matter that comes within the protection of the due process clause of the Fourteenth Amendment, but is rather a matter of procedure and practice over which the decision of the state court of last resort should govern.

Objections to the conduct of the solicitor during the trial of this cause are found on pages 38, 46, 59, and 61 of the record.

These objections are principally to the conduct of the solicitor on cross examination of the petitioner, and are addressed to the vigor with which the solicitor cross examined the petitioner. Clearly such matters are to be regulated by state practice and procedure and come no more within the protection of the due process clause than the solicitor's remarks to the jury.

The Supreme Court of Alabama is required by

law to search every criminal record for error and to render such judgment as the law demands. Code 1940, Title 15, Section 389. The case at bar was submitted to the Supreme Court of Alabama on briefs and oral arguments. It was insisted by petitioner both in oral argument and in brief that his case should be reversed because of the conduct and argument of the solicitor. While the Supreme Court of Alabama did not discuss in detail petitioner's objection to the solicitor's action, it said:

> "We have examined the other rulings of the court complained of and find nothing that invites further treatment.
>
> "It appears to us that the defendant had a fair and impartial trial, and the evidence is sufficient to sustain the judgment and sentence of the court."
>
> *Canty v. State*, 11 So. (2d.) 844

It is said in 12 American Jurisprudence, "Constitutional Law" Sec. 583:

> "The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein; nor is

it designed to reach errors in the administration of the laws not involving jurisdiction of the subject or of the parties. The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. A state may regulate the procedure of its courts in accordance with its own conception of policy and fairness unless it offends some principle of justice ranked as fundamental, such as the requirements of hearing and notice, or unless it is unreasonable or arbitrary. There is nothing in the Federal Constitution or its amendments that requires a state to maintain the familiar line between the functions of the jury and those of the court.

"When a regular course of justice by an efficacious remedy is secured by the law of the state, the constitutional requirement contained in the fourteenth Amendment is satisfied. It has sometimes been broadly stated that the adjudication of a person's claims by the courts of his own state is due process of law, that what is due process of law in a state is regulated by the law of the state, that the requirements of the Fourteenth Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular state and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government, or that the law of the state is the law of the land.

If the state courts have acted in consonance with the constitutional laws of the state and its own procedure, it is only in very exceptional cases that a Federal court will interfere on the ground that there has been a failure of due process. The proceedings in a state court need not be by any particular mode if they constitute a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it."

We submit that the Supreme Court of Alabama has correctly decided the case at bar and that petitioner has not been denied due process of law.

In the case of *State v. Hauptmann*, 115 N. J. 412, 180 A. 809, defendant objected to the closing argument of the Attorney General and also to the action of the Attorney General in arguing with and bullying the defendant and other witnesses on cross examination. Defendant contended, in the Court of Errors and Appeals of New Jersey, that such action violated his constitutional rights secured by the Fourteenth Amendment of the Constitution of the United States. The Court of Errors and Appeals of New Jersey held that defendant's constitutional rights had not been violated. Petition for writ of certiorari was subsequently denied by this Honorable court. 296 U.S. 649.

If, however, the Supreme Court of Alabama was in error in holding that the actions and remarks

of the solicitor were not prejudicial to petitioner, still petitioner has not been denied due process of law.

In the case of *Kennard v. La.*, 92 U.S. 480, the court speaking through Mr. Justice Waite, said:

> "The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State Courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all."

See also *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157.

CASES CITED BY PETITIONER

The cases cited by petitioner deal either with the admission of confessions illegally obtained or with the conviction of defendants by the deliberate use of perjured testimony. In the case at bar no confession was introduced and there is no evidence whatsoever of the use of perjured testimony. The only proposition here urged by petitioner is that he was denied due process of law because of the argu-

ment and conduct of the solicitor. We submit that none of the cases cited by petitioner deal with this proposition.

CONCLUSION

Premises considered, we respectfully submit that the petitioner was given a fair and just trial, that he was ably represented by counsel of his own choosing who diligently presented all questions of the regularity of the trial to the Supreme Court of Alabama in an able and creditable manner; that petitioner's constitutional rights were not violated by the conduct and argument of the solicitor or by any other act or omission on the part of the state, and therefore the petition for writ of certiorari should be denied, or, in the alternative, the judgment of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,

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Counsel for Respondent.

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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Brief to Honorable Alex Birch, Attorney for Petitioner, on this the 9 day of April, 1943.

WILLIAM N. McQUEEN,
Acting Attorney General
Counsel for Respondent.